



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT MISC. APP. NO. 1300 OF 2002
IN THE MATTER OF ARBITRATION ACT 1995

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

BUSURU RICHARD MARK T/A BUSURU R. M &

PARTNERS ARCHITECTS.....APPLICANT/DECREE HOLDER

VERSUS

MR. B. A. OMUSE T/A AFRO ANGLO INVESTMENTS

LIMITED RESPONDENT/JUDGMENT DEBTOR

RULING

1. The respondent/applicant's application dated 14th March 2012 is before me for determination. The application is brought under Order 22 Rules 59 (2) and 75, Order 45 Rule 1 and Order 51 Rule 1 of the **Civil Procedure Rules** and Sections 1A, 1B, 3A and 63 (e) of the **Civil Procedure Act**, Cap 21 Laws of Kenya. Interalia the application seeks the following orders:

i. That pending the hearing and determination of the application interpartes there be a stay of execution of the decree dated 14th October 2003.

ii. That time to challenge the sale and or alleged sale of LR No. 2116/IV/26 Kitale to one Peter Kakai Cheloti be and is extended irrespective of the issuance of a certificate of sale.

iii. That the sale of LR No. 2116/IV/26 Kitale to one Peter Kakai Cheloti in execution and/or purported execution of the decree dated 14th October 2003 and represented to have been held on the 2nd December 2007, any consequential orders inclusive but not limited to the certificate of sale, be and is set aside.

iv. That the order and ruling dated 25th July 2011 be and is hereby reviewed.

v. That in the alternative and or in addition, the claimant and/or his agents to account for the proceeds of the sale viz-a-viz the amount already paid by the respondent.

2. The application is supported on the grounds set out on the body of the application and the affidavit sworn in support by Bonaventure Andrew Omuse and Andrew Ombwayo on 14th March 2012 and the further affidavit sworn by the applicant on 21st March 2012. The decree holder/respondent, Busuru Richard Mark swore a replying affidavit on 12th October 2012 in opposition to the judgment debtor's application. The interested party, Kakai Cheloti, also swore a replying affidavit on 23rd September 2013 in opposition to the judgment debtor's application.

3. The applicant/judgment debtor filed written submissions and supplementary submissions in support of the application while the judgment creditor/respondent filed submissions and supplementary submissions in opposition to the judgment debtor's application. The interested party did not file any submissions. Counsel for the applicant, Mr. Ombwayo, and the counsel for the judgment creditor/respondent Mr. Wekesa made oral submissions before me on 27th November 2014 and February 2015 when they canvassed the application and highlighted their written submissions.

4. The applicant's case:

In support of the application, the applicant set out the following grounds on the body of the application:-

1. That the sale and/or alleged sale was carried out and/or proceeded without any valid warrants of attachment and sale.

2. That the notification of sale and/or intended sale of the property in question on the alleged date of 12th December 2007 was never made, published or served upon the respondent/applicant.

3. The alleged sale was carried out fraudulently, the particulars of which were that:-

a. There was no advertisement of sale.

b. There was no public auction;

c. The alleged sale was carried out in utter breach of interim orders of stay that had been made on 25th July 2007 by H on. Justice Visram;

d. The property was sold at a gross under value;

e. The applicant only knew of the alleged sale from the submissions of the claimant's advocates and had thus been denied the opportunity to promptly challenge that alleged sale.

4. That the alleged sale was premised upon, illegality and irregularities.

5. That there is an error apparent on the face of the record.

6. That there is sufficient cause/reason to review the order and ruling dated 25th July 2011.

7. That there is evidence of bias and likelihood of bias which the applicant could not produce at the time of hearing and determining the matter or application.

5. In his filed affidavit in support of the application, the applicant reiterates the aforesaid grounds. Principally it is the applicant's contention that the sale of the property on 2nd December 2007 was in flagrant breach of the order granted ex parte on 25th July 2007 by Hon. Justice Visram Staying execution of the decree/judgment of the court pending the inter partes hearing of the application filed on 25th July 2007 which was fixed for hearing on 15th August 2007. On 15th August 2007 the application was refixed

for hearing on 27th September 2007 and Hon. Justice Osiemo extended the interim order of stay until then. On the subsequent dates including the 27th September 2007 when the application was fixed for mention and/or hearing the interim order of stay was not extended. On 30th April 2009 the court made an order for the interim orders to be extended and in that regard an issue does arise whether there was then in force any interim order that could be extended. The court will address this issue later on in this ruling.

6. The applicant has additionally contended there are sufficient grounds/reasons to have the ruling by Hon. Lady Justice Sitati reviewed and in this regard the applicant argues there is an error apparent on the face of the record considering there was a stay of the sale pending the hearing of the application dated 25th July 2007 inter partes. The applicant has further alleged that Hon. Lady Justice Sitati who heard the two previous applications by the applicant dated 27th February 2006 and 25th July 2007 respectively and in respect of which she delivered a ruling dismissing both applications on 25th July 2011 had during her time in private practice as a lawyer before being appointed a judge in 2004 been involved in the matter as counsel for one of the tenants who was in a dispute as to outstanding rent arrears with the applicant as per the correspondences exchanged between the advocates marked as “**BAO4**”. The applicant thus contends there was a real likelihood of bias on the part of the judge and argues that the Hon. Lady Justice Sitati ought to have *suo moto* recused herself from dealing with the matter as her impartiality would be questionable and on this account the applicant argues there is sufficient cause to warrant a review of the order/ruling of 25th July, 2011.

7. The Respondent’s Case:

The decree holder/respondent has through his replying affidavit sworn on 12th October 2012 in opposition to the application set out in considerable detail the genesis of this matter. From the replying affidavit by the respondent it is evident the court decree arising from the order of Hon. Justice Mbiti (as he then was) dated 14th October 2003 flowed from an arbitration award made between the claimant/respondent and the respondent/applicant. By the decree the applicant was ordered to pay to the respondent the sum of kshs. 3,164,045/20 on the terms set out in the decree annexed and marked “**BRM1**”. As the applicant did not honour the terms of the decree as regards to payment of the decretal sum, the respondent initiated execution proceedings which resulted in the order by the Deputy Registrar of 12th July 2005 which was in the following terms:-

- 1. That the judgment debtor do liquidate the debt at monthly instalments of kshs. 100,000/= beginning 10th September, 2005 until payment in full.**
- 2. That in default of any one instalment execution by sale of the immovable property on the terms of sale set out in the particulars and terms filed in court on 24th March 2005 with necessary amendment on the decretal sum and date of sale to issue.**
- 3. That the attachment orders do remain in force until full payment.**

8. The respondent avers that the applicant failed to abide by the terms of the order of 12th July 2005 which prompted the respondent to recommence the attachment and sale process of the judgment debtor’s immovable properties namely LR No. **2116/IV/26** and LR No. **Trans Nzoia/ChemiChemi/60** situate in Kitale which were advertised for sale on 2nd March 2006. This provoked the application by the judgment debtor dated 27th February 2006. The respondent avers that at the time he reinitiated the execution process and specifically in October 2007 when M/s Gillette Traders Auctioneers were instructed to sell the debtors immovable property LR No. **2116/IV/26 Kitale** and **Trans Nzoia/ChemicheMi/60**, there was not in force any court order for stay of execution of judgment, the previous order of stay having lapsed and not having been extended. The respondent avers that following notification of sale by the auctioneers LR No. 2116/IV/26 was on 3rd December 2007 duly sold to one Peter Kakai Cheloti for kshs. 9,000,000/= and a certificate of sale issued. The respondent asserts that the judgment debtor’s Notice of Motion dated 27th February 2006 was rendered superfluous and/or was overtaken by events as the

judgment debtor obtained an ex parte order that stopped the sale that had been scheduled for 2nd March 2006. It is the respondent's position that only the specific sale scheduled on 2nd March 2006 was stopped and not any subsequent sales.

9. The respondent avers that the applicant having failed to satisfy the decree in terms of the order of 12th July 2005 the respondent was entitled to execute the decree. As per the order of 12th July 2005, the attachment orders were to remain in force until full payment of the decretal sum and hence as at 3rd December 2007 when the sale took place there was no stay of execution of the decree. The respondent has further denied that there was any irregularity and/or fraud in the sale of the property to vitiate the sale and has further averred that there was no evidence of bias and/or impartiality on the part of Lady Justice Sitati to warrant the setting aside and/or review of the ruling dated 25th July 2011. The respondent contends the applicant had instead used the court process to frustrate the judgment creditor's efforts to realize the fruits of his judgment and asserts that the applicant's present application is equally intended to frustrate the respondent in his bid to execute the decree.

10. The applicant in a further supporting affidavit sworn on 21st March 2012 reiterated that his property LR No. 2116/IV/26 had by December 2007 been valued at kshs. 45,000,000/= and hence its purported sale by public auction at kshs. 9,000,000/= was a gross undervalue which the applicant avers is a manifestation of fraud, illegality and unlawfulness. The applicant additionally argues account has never been taken by the respondent of the fact that the applicant had so far paid over kshs. 1,820,000/= towards the settlement of the decretal sum and therefore there was no justification for the purported execution of the decree.

11. Submissions by the parties, analysis and determination

The parties canvassed the respondent/applicant's application dated 14th March 2012 by way of written submissions. **Mr. Ombwayo** advocate for the applicant and **Mr. Wekesa** advocate for the claimant/respondent orally highlighted their respective parties submissions before me on 27th November 2014 and 25th February 2015. After reviewing the application and the affidavits in support and in opposition thereof and the parties submissions the issues for determination in this application are:-

- 1. Whether the interim order by Visram J (as he then was) of 27th July 2007 stayed the execution of the decree dated 14th October 2003.**
- 2. Whether there was an order staying execution of the decree on 3rd December 2007 when the judgment debtor's property LR No. 2116/IV/26 was purportedly sold by public auction?**
- 3. Whether the sale of LR No. 2116/IV/26 should be set aside on account of fraud and irregularity.**
- 4. Whether the ruling by Hon. Lady Justice Sitati of 25th July 2011 should be set aside.**

12. Issue Numbers (1) and (2):

The order granted on 26th July 2007 by Hon. Justice Visram was in the following terms:-

- 1. That this application be and is hereby certified urgent.**
- 2. That the sale by public auction of all those pieces of parcels of land known as LR No. 2116/IV/26 and LR No. Trans Nzoia /Chemi Chemi/60 by Messrs Gillette Traders Auctioneers on August 7th 2007 be and is hereby stayed pending the hearing and determination interpartes of this application.**

3. That the application be served forthwith for hearing inter partes on 15th August 2007 subject to vacation Rule.

13. The order clearly did not stay the execution of the decree of 14th October 2003 but did stay the sale of the properties therein stated and specifically the sale of the properties scheduled for August 7th 2007 was stayed pending the hearing of the application inter partes on 15th August 2007. The order staying sale of the property was therefore valid upto 15th August, 2007 when unless it was confirmed and/or extended it would lapse. The court record shows the matter came before Hon. Justice Osiemo on 13th August 2007 in the presence of counsel for the applicant but in the absence of counsel for the respondent. The Notice of Motion dated 25th July 2007 was fixed for inter partes hearing on 27th September 2007 and the interim order was extended till then. On 27th September 2007 the application was not heard inter partes but was adjourned to 16th October 2007. The interim order staying the sale of the properties was not extended and consequently lapsed. On 16th October 2007, the respondent raised a preliminary objection to the Notice of Motion dated 25th July 2007 which was part heard and adjourned for further hearing on 29th October 2007. The applicant did not seek a reinstatement of the interim orders and consequently there were no orders to extend and none were extended.

14. On 29th October 2007 the applicant drew attention to the court that there were new developments that had taken place as the respondent decree/holder had advertised the suit premises for sale and the sale had been scheduled for 3rd December 2007. The matter was fixed for further hearing of the preliminary objection on 5th November 2007 when again the hearing was adjourned to 15th November 2007. As in the previous occasion no interim order was reinstated and none was extended. There was no request or application by the applicant for the sale scheduled for 3rd December 2007 to be suspended and/or stayed.

15. Given the above sequence of events, it is my view that the order staying the sale of **LR No. 2116/IV/26** given by **Visram J.** on 26th July 2007 lapsed on 27th September 2007 when it was not extended. There was no order generally staying the execution of the decree in the matter. Indeed the order by the Deputy Registrar of 12th July 2005 (earlier set out) under Order (2) permitted the execution of the decree to proceed as long as the judgment debtor defaulted in making payment of the instalments he had bound himself to pay. It is instructive that the applicant by 29th October 2007 had become aware that the respondent had caused the property to be advertised for sale and that the sale was scheduled on 3rd December 2007. What did the applicant do to avert the sale? Apparently there is no evidence he took any steps to stop the sale.

16. On the first and second issues I make the finding that there was no order in place staying execution of the decree dated 14th October 2003. I further make a finding that at the time the judgment debtor's property was advertised for sale and sold on 3rd December 2007 there was no order in place staying execution of the decree and/or staying the sale of the property as the order of stay issued by Hon. Justice Visram on 26th July 2007 had lapsed.

17. Issue Number (3)

The applicant premises his application to have the sale of property **LR No. 2116/IV/26** set aside on the grounds that the sale was fraudulent on the basis that there was no advertisement and that the sale was carried out in breach of interim orders by Visram, J and that the sale was at a gross under value. I have anxiously considered the contentions of the applicant in regard to his allegations of fraud respecting the conduct of the sale. The applicant says there was no advertisement of the sale. The respondent states the notification of sale was served on the applicant's caretaker one Mr. Nyaga on 26th October 2007. This fact would appear credible as borne out by the fact that when the applicant's advocate appeared in court on 29th October 2007 he notified the judge that the property had been advertised for sale on 3rd December 2007. The respondent also exhibited a payment receipt from Nation Media Group Ltd issued on 28th November 2007 together with the caption that was to be advertised or carried in the Daily Nation

Newspaper on 29th November 2007 notifying the sale by public auction of the property **LR No. 2116/IV/26** on 3rd December 2007. In the premises I am not persuaded there was no advertisement of the property and I am satisfied that the applicant was aware of the sale scheduled on 3rd December 2007 as at 29th October 2007 when he drew attention of the fact to the court.

18. I have already held that there was no order in force as at 3rd December 2007 staying the sale of the suit property by public auction and neither was there in force any order staying the execution of the decree in the suit. The applicant's other ground that the property was sold at a gross undervaluation poses some difficulty in determining. The applicant through his further affidavit sworn on 21st March 2012 has annexed a valuation report on **LR No. 2116/IV/26** made on 20th March 2012 which indicates the open market value of the property in 2007 could have been kshs. 45,000,000/= and the market value as at February 2012 as kshs. 53,000,000/=. In the notification of sale served on the applicant by the respondent, the forced sale value of **LR No. 2116/IV/26** is indicated as kshs. **4,205,000/=** while that of **Trans Nzoia/Chemi Chemi/60** is shown as kshs. **10,000,000/=**. The property **LR No. 2116/IV/26** was sold for kshs. 9,000,000/=. The respondent avers that the applicant is raising the issue of undervaluation of the property to seek the sympathy of the court as he has been aware that the property was bought for kshs. 9 million from the evidence of the sale availed by the claimant/respondent in the affidavit sworn in opposition to the applicant's application dated 27th February 2006 and 25th July 2007 which were both dismissed on 25th July 2011. The respondent avers that the issue of the property having been sold at an undervalue is merely an afterthought intended to discredit the sale that took place on 3rd December 2007.

19. The valuation report that the applicant relies upon to assert that the suit property was sold at an undervalue was specifically sought by the applicant to support the instant application after a period of over 4 years after the alleged sale took place and after the applicant's application dated 27th February 2006 and 25th July 2007 were disposed of. I view the valuation report as intended to achieve the purpose of discrediting the sale on 3rd December 2007 and giving impetus to the application by the applicant. The auctioneer had in the notification of sale fixed the forced sale value which no doubt acted as the reserve price for the property. It has not been suggested that the auctioneer and the buyer at the auction were acting in collusion so that they fraudulently conspired to have the property sold at an undervalue. By all appearances the buyer was an innocent purchaser at the auction and his bid having been accepted and a certificate of sale issued to him he is entitled to have the sale to him completed.

20. The applicant has alleged irregularity and fraud in seeking to set aside the sale of 3rd December 2007 and I am not satisfied the applicant has established or proved any fraud and/or any irregularity to warrant me to set aside the sale. The burden to prove fraud lies on the person who alleges and such proof needs to be on a standard that is higher than on a balance of probability. The applicant's application inter alia is premised under Order 22 Rule 75 which provides:-

75. Where any immovable property has been sold in execution of a decree, the decree-holder; or any person whose interest are affected by the sale, may apply to the court to set aside the sale on the grounds of material irregularity or fraud in publishing or conducting it:

Provided that no sale shall be set aside on the grounds of irregularity or fraud unless upon the facts proved, the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

21. In the instant case the respondent had a valid decree that had not been satisfied by the applicant. In terms of the order by the deputy registrar of 12th July 2005 the respondent was entitled to proceed with the execution of the decree as he did. On issue number (3) I would therefore hold there was no irregularity or fraud to vitiate the sale of 3rd December 2007 and I accordingly uphold the same.

22. Issue number (4)

From what I have so far said in this ruling the determination of this issue is mute as it is unlikely to affect

the outcome. The ruling by Sitati J. of 11th July 2011 disposed the applications by the applicant dated 27th February 2006 and 25th July 2007. Lady Justice Sitati dismissed both applications on the basis that the specific orders emanating from those applications related to stoppage of specific scheduled sales and there was no order staying the execution of the decree dated 14th October 2003. She held that the two applications had been overtaken by events.

23. The applicant in seeking review of the ruling/order of 11th July 2011 contended that the judge had failed to note that there was a stay of execution pending the hearing and determination of the application dated 25th July 2011 and that this constituted an error on the face of the record which ought to justify a review. Further the applicant contended owing to the past conduct of the judge when she was in private practice where she had acted for a tenant against the applicant there was a likelihood of bias and impartiality against the applicant.

24. Having on my own independent analysis come to the conclusion that there was no order in place staying execution on 3rd December 2007 since the order issued by Hon. Justice Visram on 26th February 2007 had expired I see no basis upon which Hon. Lady Justice Sitati could be faulted. In my view she properly evaluated the facts placed before her and came to a proper conclusion and finding. There is in my view no credible basis to suggest that since she had acted for a tenant of the applicant on a case relating to rent arrears which did not relate to the present case then she would be biased against the applicant. Although the parties appeared before Hon. Lady Justice Sitati severally, the issue of conduct and/or likely bias was not put to her for her to consider whether to recuse herself or not. There is absolutely no proof that her ruling was in any way or otherwise influenced by what she did in private practice as a lawyer. I hold the allegations of bias to be unjustified.

25. The applicant in my view has not satisfied any of the conditions under Order 45 of the **Civil Procedure Rules** to justify a review of the order of 11th July 2011 and on this ground also the applicant's application lacks merit and should fail. The upshot is that I find and hold that the applicant's application dated 14th March 2012 lacks any merit and the same is dismissed with costs to the judgment creditor/respondent.

26. Orders accordingly.

Ruling dated and signed at Kisii this 15th day of February 2016.

J. M MUTUNGI

JUDGE

Ruling delivered at Nairobi this 17th day of March 2016.

S. OKONG'O

JUDGE

In the presence of:

Mr. Ombwayo for the Applicant

Mr. Mbaluto for the Respondent

Kajuju Court Assistant

S. OKONG'O

JUDGE